DOCUMENT RESUME

ED 261 341 CS 008 133

AUTHOR	Stratman, James F.
TITLE	Readers' Perception of Contractual Rights in a Medical Insurance Summary. CDC Technical Report No. 15.
INSTITUTION	Carnegie-Mellon Univ., Pittsburgh, PA. Communications Design Center.
REPORT NO	CDC-TR-15
PUB DATE	May 85
NOTE	49p.; Several pages in appendices may not reproduce clearly.
PUB TYPE	Reports - Research/Technical (143)
EDRS PRICE	MF01/PC02 Plus Postage.
DESCRIPTORS	Adults; *Content Analysis; Court Litigation; Employer Employee Relationship; Ethics; *Insurance; *Language Usage; *Legal Responsibility; *Reader Response; Reading Comprehension; Reading Research; *Retirement Benefits
IDENTIFIERS	*Disclaimers; Language Simplification

ABSTRACT

Two experiments were conducted to determine what readers are likely to understand about the information contained in a medical insurance brochure intended for employees. Twenty-seven subjects were recruited through newspaper advertisements for a "reading experiment." The studies addressed questions concerning (1) how likely readers are to notice the fine-print "contract disclaimer" contained near the end of the brochure's summary; (2) how failure to notice this disclaimer would affect the readers' understanding of contractual rights under the insurance plan; (3) the problems readers are likely to have in understanding the meaning or implications of the disclaimer, assuming they do notice it; and (4) what inferences readers are likely to draw about the nature of their coverage under the summary plan, given the information presented in the summary. Results of the subjects' readings and interviews suggest that readers are very unlikely to read the disclaimer in its present position and with its smaller typeface. In addition, given the language presently used in the brochure, few readers are likely to believe that the company is not obligated to cover its retirees following a shut-down. (HOD)

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ED261341

CDC Technical Report No. 15

Readers' Perception of Contractual Rights in a Medical Insurance Summary

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May 1985

CDC Technical Report Series

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READERS' PERCEPTION OF CONTRACTUAL RIGHTS

IN A MEDICAL INSURANCE SUMMARY

Testimony Prepared For United Steelworkers Of America
Bower vs. Bunker Hill
U. S. District Court, Eastern District Of Washington

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Summary

This evaluation offers research-based evidence concerning what readers are likely to understand about the information contained in a medical insurance summary distributed by Bunker Hill Company to its employees. The evaluation thus does more than merely offer an "expert opinion" about the clarity (or lack of clarity) in a document. Instead, it presents some testable conclusions. The research attempted to answer several questions:

1. How likely are readers to notice the fine-print "contract disclaimer" contained near the end of the summary?

2. How would failure to notice this disclaimer affect readers' understanding of contractual rights under the insurance plan?

3. What problems is the reader likely to have in understanding the meaning or implications of the disclaimer, assuming the reader does notice it?

4. What inferences are readers likely to draw about the nature of their coverage under the summary plan given the information presented in the summary?

Our research leads us to two conclusions about the present brochure. First, it strongly suggests that readers are very unlikely to read the disclaimer in its present position and with its smaller typeface. Contrary to the contention of Bunker Hill Company, our research indicated that this disclaimer is clearly inadequate and does not serve its intended purpose. Moreover, if readers do not see or heed the disclaimer, they are more likely than otherwise to conclude that the brochure itself is a contract or states the actual liability of the company. Second, unless an explicit statement is provided that *reserves the company's right to cancel the plan in the event of a plant closing*, most readers of the present brochure are unlikely to know what their rights in this case are. Given the language presently used in the brochure, few readers are likely to believe that the company is *not* obligated to cover its retirees following a shut-down. On the contrary, our results suggest that most readers will believe the plan covers them "lifetime" and that it may not be cancelled by the company.

Introduction

Is The Use Of Contract "Disclaimers" In Summary Plans A Deceptive Practice?

Ever since the passage of the Employment Retirement Income Security Act (ERISA) (29 U. S. C. 1001 *et seq.*) in 1974, employers have been required to provide their employees with what are known as "summary plans." These "summary plans" – usually printed as short brochures, folders, leaflets or booklets – describe the rights and obligations of employees upon their retirement. Typically summary plans include such things as the conditions under which the employee is eligible to collect a variety of insurance benefits, the contributions (if any) the employee must make toward insurance premiums, length of coverage, and so on. They are presented to the employee sometime before retirement, usually when the employee has worked enough years and met other requirements to become eligible.

Presumably, one purpose in requiring an employer to provide a "summary plan" to the employee is to make it easier for non-lawyers to understand the *exact terms* of their employment and retirement, without getting confused by the "legalese" of a comprehensive insurance policy. However, a responsible "summary plan" should accurately reflect all of the provisions of this "original," comprehensive plan, albeit in less "technical" language. To try to insure accuracy in disclosure, ERISA includes "plain-language" provisions specifying not only *what information* the "summary plan" must contain, but also *how* that information should be displayed (e.g., what size typeface can be used) so as to be most easily understood.

Unhappily, however, the precise legal relationship between the "summary plan" and the original "plan" has never been clarified. As a result, the use and design of such "summaries" is now fraught with controversy. The basic problem is that ERISA provisions do not state whether or not such condensed "summary plans" constitute binding contractual agreements between the trustees of the plan and the employee. Ironically, the result of omitting such a clarification from ERISA is that many "summary plans" are now threatened by the same obscurity, double-talk and ambiguity that is the bane of the larger, original plan documents. Increasingly, disputes about the contractual status of these documents are appearing in the courts. For though the plain language provisions of ERISA do indicate what information such "summary plans" must include, along with a few meager requirements for style, the provisions are written in rather general language. They are therefore subject to a wide – if not exasperating – variety of interpretations. Reading these provisions, some careful employers or plan trustees may design the "summary plan" as a "mirror image" of the "comprehensive plan," while others are tempted to use the "summary" plan merely to

highlight "positive" aspects of the plan and screen out "negative" aspects.

Indeed, corporations eager to exploit the vagaries of ERISA provisions may include in their summary plans "disclaimers" whose purpose is to explicitly deny that these "summary plans" have any contractual status. ERISA provisions do not specifically prohibit the use of these contract "disclaimers," which may employ misleading or unfairly technical information, or may even contradict statements made elsewhere in the summary. In one particularly onerous practice, some insurance companies go so far as to include places for signatures on documents that also contain contract "disclaimers." Since most laypersons assume that any document to be signed is "official" or "legally" binding, these companies deceive the person who signs into believing that what is *not legally* the complete contract actually is.

Because no ERISA provision prohibits these disclaimers, corporations or their retirement plan trustees are free to word their disclaimers in any way they choose, to broaden or narrow the scope of the disclaimer through the use of modifying language, or to use other accompanying devices to screen their real contractual liability from view. The tacit assumption behind these practices is that "summary plans" do *not* have to be completely accurate "reflections" of the original plans so long as a "disclaimer" to that effect is included. In other words, the summary plan may report only part of the comprehensive plan (or actual contract) – i.e., only part of the employees' rights or the company's obligations. Given this omission in ERISA, the average worker must surely wonder if the effort started by ERISA to clarify the language of "summary plans" is not finally a hoax to provide lawyers with still larger territory for litigation and profit. Indeed, *any* use of disclaimers does seem to turn the whole purpose of ERISA on its head, i.e., to require *full disclosure* of employees' retirement plans in plain language.

Underlying the legal and ethical questions raised by the use of disclaimers in summary plans are a host of empirical questions concerning how readers understand and interpret these controversial devices. For instance, what design practices (including those now mandated by ERISA) are likely to insure that ordinary readers will *notice* and *read* these disclaimers? And if readers do take note of them, how will readers construe or interpret their meaning? What guidelines for writing these disclaimers might be demonstrated as appropriate by experimental research? Or, would such research show that the very use of such disclaimers is (at best) very confusing to readers and therefore a practice to be strictly prohibited?

The purpose of the present study is to begin to address these questions. The study reports the results of two similar experiments, each attempting to find out what readers are likely to understand about the information contained in a medical insurance "summary

plan." In particular, the experiments focus on readers' perception and understanding of a contract disclaimer used in the summary plan. Both experiments were undertaken in response to a request by attorneys representing the United Steelworkers of America (USW) in *Bower v. Bunker Hill* 725 F. 2nd, 1221 (1984). Attorneys for the Steelworkers were seeking testimony indicating whether or not a particular summary plan "adequately" informs readers of their contractual rights. The summary plan in question was provided by Bunker Hill Company to its employees (members of USW) who were approaching retirement.

However, before explaining further the nature and history of the specific legal dispute in *Bower v. Bunker Hill* that necessitated the present research, we need to briefly examine how the present controversy over the use of contract disclaimers is being addressed. In particular, we need first to review the relevant ERISA provisions, and then to see how some courts have been interpreting them.

ERISA "Plain Language" Provisions And The Courts

As noted above, ERISA "plain language" provisions regulate two aspects of summary plan documents. First, some ERISA provisions indicate *what information* a summary plan document must contain. Second, other provisions indicate how this required information is to be *formatted or organized*.

Provisions defining the *content* to be presented in the summary brochure include the following:

> 1022 (a) (1) The summary plan description . . . shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. . . (b) The summary plan . . . shall contain . . . a description of the relevant provisions of any applicable collective bargaining agreement . . . and circumstances which may result in disqualification, ineligibility, or denial or loss of benefits . . .
>
> 2520.102-3 . . . The summary plan's description must accurately reflect the contents of the plans as of a date not earlier than 120 days prior to the date such summary plan description is disclosed. . .

Provisions defining the *organization* of the summary include the following:

> 2520.102-2 (b) The format of the summary plan description must not have the effect of misleading, misinforming or failing to inform participants and beneficiaries. Any description of exceptions, limitations, reductions, and other descriptions of plan benefits shall not be minimized, rendered obscure, or otherwise made to appear unimportant. Such exceptions, limitations, reductions, or restrictions of plan benefits shall be described or summarized in a manner

> not less prominent than the style, captions, printing type, and prominence used to describe plan benefits.

The goal of these provisions has been recently set forth in a number of court opinions. A good example is *Hillis v. Waukesha Title Co., Inc.* 576 F. Supp. 1103, 1983. Here the court cited the Congressional testimony that led to the adoption of these "plain language" provisions:

> It is grossly unfair to hold an employee accountable for acts which disqualify him from benefits, if he had no knowledge of these acts, or if these conditions were stated in a misleading or incomprehensible manner in plan booklets. Sub-committee findings were abundant in establishing that an average plan participant, even where he has been furnished an explanation of his plan provisions, often cannot comprehend them because of the technicalities and complexities of the language used. . . Experience has . . . demonstrated a need for a more particularized form of reporting so that the individual participant knows exactly where he stands with respect to the plan -- what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits, what procedures he must follow to obtain benefits, and who are the persons to whom the management and investment of his funds have been entrusted. H. R. Rep. No. 93-533, 93rd Congress, 1st Sess., reprinted in [1974] U.S. Code Cong. & Adm. News 4639, 4646, 4649.

As we also noted earlier, a recent concern of the courts has been the use of "contract disclaimers" - brief statements included in the summary plan whose apparent purpose is to indicate that the summary plan is not complete and that the employee must refer to some other source or documentation to determine what information is missing. For example, in *Zittrouer v. Uarco Inc. Group Benefit Plan* 582 F. Supp. 1471 (1984), the court strongly condemned the specious use of such disclaimers in summary plans:

> Defendant (Uarco) relies on language contained in the booklet which states that the booklet "describes the highlights of the [Uarco] plan" and that "Medical Benefits are described fully in the Plan Document." This focus misses the point. By law defendant is required to include within the summary plan "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits. . . " 29 U.S.C. * 1022 (b). Defendant's failure to do so is at best gross negligence and at worst intentional deception through concealment or inaction. The fact that defendant's summary plan included the quoted disclaimers does not relieve the defendant of the statutory requirement of disclosure. To allow a plan to avoid statutory requirements of disclosure by including disclaimers of this sort would negate one of ERISA's major goals, protection of employees and beneficiaries. The court holds disclaimers of this sort are invalid in light of ERISA's requirements of disclosure.

While the Court in this case appears to issue a general condemnation of contract disclaimers, not all Courts are bound to agree. Certainly it is conceivable that *some kinds* of disclaimers would be understandable - if carefully tested and designed. But such testing, it appears, is seldom carried out, and a tremendous variation in types of contract

disclaimers is possible.

The Argument In Bower v. Bunker Hill

Questions concerning the "adequacy" of the Bunker Hill summary plan first arose in the judicial opinion rendered by the Ninth Circuit Court of Appeals (*Bower v. Bunker Hill* 725 F. 2nd, 1221, 1984.) The underlying legal dispute is whether or not Bunker Hill Company violated its contract with USW when, following a shut-down of its mining operations, the Company informed USW retirees that medical insurance benefits would no longer be paid. USW claims these benefits are vested for its retirees and may not be cancelled by the Company. But since these benefits are nowhere limited, or even described, in the official collective bargaining agreement worked out between USW and Bunker Hill, the Court turned to "extrinsic" sources of evidence to establish whether or not a contract in fact existed (See opinion in *Bower v. Bunker Hill*, in Appendix 2.). The Company maintains that it explicitly reserved the right to cancel in its separate insurance contract, apart from the summary plan it distributed to its employees. Indeed, the Company points out that their summary plan contained a disclaimer informing the employee that the summary is "not a contract," and telling the employee where the "real" contract could be obtained.

The disclaimer at issue reads as follows:

> Note: This is an illustration of benefits - not a contract. For details of all benefits, limitations and exclusions, you may see a copy of the contract at the personnel office of the Bunker Hill Company in Kellogg.

Among other documents, the Court reviewed the summary plan distributed to Bunker Hill employees, and asked if this disclaimer "adequately" informs the employee that the insurance plan is subject to contractual terms not mentioned in the summary (See Appendix 1 for a copy of the summary plan and the disclaimer.) The court raised this question because the contract disclaimer used in the Bunker Hill summary was printed in *smaller typeface* than the surrounding text, and further noted that such a practice violated specific provisions in ERISA. In addition, the Court noted that the first paragraph of the summary speaks of a premium benefit which, "in the event of your death" may cover "your children and surviving spouse." If employeess do not notice or understand the implications of the contract disclaimer placed near the end of the summary, they might naturally construe this earlier language to mean that their coverage under the plan is "lifelong" - or, irrevocable under the eligibility conditions that the summary sets forth. Given this suggestive initial langauge and the chance of not seeing or misunderstanding the disclaimer, the Court therefore asked if retirees would simply assume the summary was a statement of their contract. The Court did not pass judgement on the "adequacy" of the disclaimer, but simply

remarked instead that such "adequacy" constituted a "factual dispute" requiring further testimony.

Testable Assumptions About Contract Disclaimers

As noted above, the Bunker Hill Company presently maintains that its insurance benefits – indeed, the entire plan – are not vested and can be cancelled at the company's discretion. According to the Company, the plan's premium benefits are neither lifelong nor irrevocable; Company representatives point out that the Company's right to cancel the plan is stated in the complete "contract" to which the employees may have access at any time. Moreover, the Company points out that the fine-print disclaimer in the brochure mentions this real "contract," and thus they argue that the summary *together with this contract* constitutes an adequate disclosure of the employees' rights. That is, the Company feels the disclaimer adequately notifies the retiree, albeit indirectly, that the plan is not necessarily "lifelong" or irrevocable. However, an important *testable* assumption of this Company view is that *most readers of the brochure will readily notice and understand* the disclaimer. This assumption is the focus of our evaluation.

For instance, if the Company's assumption about the adequacy of the disclaimer is correct and the disclaimer is properly serving its function, the reader should easily infer that the "contract" it mentions may qualify, or even deny, what the initial language of the brochure may suggest to be a "lifetime" benefit. If the reader trying to clarify the length of coverage provided by the plan understands the disclaimer, he or she will consult (or request to consult) the "contract" it indicates. The disclaimer should be noticeable enough to insure that readers will not rely exclusively upon the language in the brochure to find out exactly how long the plan lasts. Empirical evidence would be helpful in determining whether or not the disclaimer performs as the Company claims it does.

However, regardless of the results of any experimental test, one point should be made clear: the Company's failure to *directly state* the "right to cancel" *in the brochure* plainly violates the ERISA provisions cited previously (Cf. *Zittrouer v. Uarco* 582 F. Supp. 1471 (1984)). These provisions require that the "summary plan" describe "circumstances which result in disqualification, ineligibility, or denial or loss of benefits." The right to cancel the plan and any of its benefits is *nowhere* stated in the brochure. The terms "cancel" and "cancellation" are never mentioned. In addition, the use of smaller typeface in such a disclaimer is also explicitly forbidden under the ERISA provisions mentioned above. The Company appears to be arguing that, in spite of these violations, the disclaimer is effective *as a substitute* for an explicit statement about their right to cancel. Again, whether or not the disclaimer is "effective" – that is, whether it is *noticeable and understandable* to the

average reader – is the question we have attempted to address here through experimental means.

Protocol methodology is ideally suited to test these assumptions about readers' behavior and inferences. Originally developed at Carnegie-Mellon University, this methodology has been used extensively by document design researchers to investigate reader comprehension processes and constraints.[1] When performing a task, such as reading and answering questions or filling out a complex form, the subject giving the protocol is asked to "think-aloud," saying everything that comes to mind. The subject's comments are recorded and transcribed for subsequent analysis. We used a form of protocol methodology in the two experiments we report here.

Indeed, to determine the "adequacy" of the Bunker Hill disclaimer we needed to investigate what readers are thinking as they try to "use" the summary. Specifically, we designed two experiments, each of which addresses both of the following questions:

1. Will the disclaimer itself be *noticed and read* by readers, given that it is printed in smaller typeface than the surrounding text and placed near the end?

2. If the disclaimer is *not* noticed *and* read by the employee, what is the employee likely to believe about his rights and benefits under the Bunker Hill plan?

In the sections that follow we explain the purpose, subjects, protocol methods used and results of each experiment in detail. We also explain the implications of the experimental results in relation to the claims made by Bunker Hill Company.

Experiment One

Purpose

The purpose of the first experiment was to determine whether or not readers are likely to notice the small-print disclaimer in the brochure, *if given ample motivation and reasonable opportunity* to do so. In particular, the experiment tested whether or not readers, if given questions which should lead them to attend to the disclaimer, would take note of the information it contains. In addition, we wished to investigate what readers would understand about their length of coverage under the plan and also about the (disputed) right of the Company to cancel the plan.

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[1] See, for example, "Revising Functional Documents: The Scenario Principle" by Linda Flower, John R. Hayes and Heidi Swarts (Document Design Project, Technical Report No. 10, March, 1980).

Subjects

Subjects were recruited through newspaper advertisements for a "reading experiment." Each subject was paid $8.00 for participation. A total of twenty-seven subjects participated (13 men, 14 women). In order to match this subject population with the population of readers for whom the brochure was originally intended, all subjects in the present experiment were over 40 years of age, ranging from 40 to 79 years of age, with a mean age of 58.5 years (Males, Average = 60; Females, Average = 57). Occupations of subjects varied, but no subject was allowed to participate who had previously worked for an insurance company, or in a benefits/retirement office of a company. (See Appendix 3 for list of occupations). Thus, subjects were excluded who might have a professional understanding of retirement or medical insurance plans. Subjects' formal schooling ranged from 8 years to 16. The mean number of years of formal schooling was 12.5 years (Males, Average = 11.9; Females, Average = 13.2).

Method

To test readers' perception of the disclaimer a task is needed that will compel subjects to look for the disclaimer, *to at least the same degree they might if they were actually recipients of the insurance plan.* Indeed, we would like to have subjects read the document *more carefully* than we would expect the average employee to read it. In order to create these favorable conditions, we designed the study as follows:

(1) Subjects were paid $8.00 each for participation.

(2) Subjects were interviewed individually. They were asked to read (silently) the brochure carefully, taking as much time as they required. They were told specifically *not to hurry.*

(3) As a further incentive to read carefully, subjects were told that they would be asked to read and answer questions about the brochure. They signaled the experimenter when they were ready for this part of the task. However, they were told they need not memorize the brochure's contents while they read, because *they were free to search the brochure (as much as they liked) for information.* Actual employees receiving the brochure presumably might take as much time as they wanted to read the brochure and check its contents. Therefore, no time limit was placed upon subjects as they answered the questions.

Purpose And Focus Of Questions. Questions were typed on 3"x 5" cards (one question per card). There were nine questions in all. To prevent possible effects due to question order, questions were randomly sequenced for each subject – except for question nine,

which always came last (see Appendix 4 for task directions and list of questions).

The purpose of using these questions was to motivate the subjects to read *and re-read* the brochure more carefully than the average employee might. Of the nine questions, six (specifically, 1, 3, 5, 6, 7, and 8) motivate the subject to consult the disclaimer to provide an adequate answer. (None of the questions directly mentions the presence of the disclaimer). Complete, accurate answers cannot be given to these questions unless the reader has seen the "contract" cited in the disclaimer. In particular, questions 1, 3, 5, and 7 ask the reader about the company's right to "cancel" the plan. As we noted above, the brochure mentions nothing about "cancellation" of the plan. We hypothesize that if the small-print disclaimer was properly serving its function (i.e., to refer the reader to the official "contract") readers confronting these particular questions should express their need to see this "contract," thus indicating they saw the disclaimer text.

For example, we would expect a subject, when reading question one, to look (again) in the brochure for any information about "circumstances" under which the plan could be cancelled. Not finding these "circumstances" discussed, the subject *should* heed the disclaimer, and verbally indicate that the question might be answered by looking in the official "contract." Similarly, to be answered properly, questions 6 and 8 also require that the reader heed the disclaimer and refer to the "contract" it mentions. That is, judgements about the "accuracy" of the benefits or conditions of the plan should be voiced with the qualification that the brochure is not itself the actual plan - as the disclaimer seems to imply.

To reiterate, the point of this question technique was to provide subjects with ample reason to "notice" and read the disclaimer, and to "use" or "process" the information it contains, but without *overtly* calling their attention to its presence. None of the questions refer directly to the disclaimer or its terms. We are here primarily interested in the content of subjects' answers insofar as they indicate whether or not they have noticed the disclaimer.

Data Collection Procedures. "Think-aloud" comments were collected during the question and answer task which immediately followed the reading task. Subjects were free to re-read the document. When subjects' signaled that they had completed their (initial) reading, they were given the questions printed on cards and asked to read and answer each question out-loud. Thus, each subject's answers were tape-recorded and later transcribed. If subjects appeared not to understand either the task directions or the questions, the experimenter did not intervene. Such subjects were allowed to complete the experiment but their data was not used in the evaluation.

As noted above, subjects were asked to read the brochure silently. Although the "thoughts" of subjects while reading-aloud might be interesting in another experiment, no tape-recording was made of their reading process here, for two reasons: (1) We would not expect the average employee to read the brochure out loud, nor to "think-aloud" while doing so; (2) To ask subjects to read aloud in the present context might unfairly bias them to read each part of the brochure, and directly force them to notice the disclaimer. Such an artificial instruction (i.e., to read *and* think-aloud) would not replicate the "natural" situation of the employee. Therefore, no data was obtained concerning the subjects' initial reading process or focus of attention during reading.

The resulting transcriptions (of the question task) were checked to see if subjects gave any *verbal indication* that they had noticed the disclaimer in the course of answering the questions. A "verbal indication" might consist of any number of words or phrases used by the subjects in responding, for example, mention of a "contract," of the "Note," "Note in fine-print," or "the personnel office of the Bunker Hill Company," etc. In other words, any part of the transcripted comments containing a direct reference to terms used in the disclaimer was scored as a "hit" for that subject.

However, we must mention two important exceptions to this scoring technique. First, *not every reference* to terms used in the disclaimer necessarily means that the subject saw or read the disclaimer. For instance, a subject may say he "would like to see the full plan" or "full contract," not because he actually read or understood the disclaimer, but rather because he had *prior experience* with such insurance plans. Based upon this experience, then, rather than upon direct perception of the disclaimer, he might make such remarks. Subjects who made these kinds of remarks were directly asked, at the end of questioning, *why* they made them. For example, if, during the course of the questioning task, a subject said, "I would like to see the full plan," the experimenter would later ask him or her: "Why did you say you wished to see the full plan?" If the subject offered as a reason that he had seen the "fine-print" or "the small note at the end," then the experimenter recorded a "hit" for the subject. Alternatively, if the subject answered, "Because these things are usually not the whole plan," or said, "They are usually not the whole contract," or "There's no place to sign this document" *without any reference whatsoever to the disclaimer*, then the experimenter would *not* record a "hit" for this subject.

The second exception concerns the possibility that subjects might actually read the disclaimer and think about its meaning, yet later (in response to the questions) never make any reference to the terms or phrases used in it. That is, some observers might argue that just because subjects *failed to make remarks* indicating they had seen the disclaimer does not necessarily mean they did not see or read it. However, we would argue that, given the

number of opportunities provided by the experiment to attend to the disclaimer and the other "motivational" factors outlined above, this possibility is a very slim one. Indeed, the experiment was designed not only to promote *observation* of the disclaimer, but also to induce the subject to *audibly process* the information it contained. The question task itself was constructed for precisely this purpose, that is, to induce the subject to *re-read* the document and *search* its text for answers – a process captured by the transcription. It is very unlikely that subjects would have *silently* noticed, read and understood the disclaimer, and then *fail completely to vocalize* its relevance to *any* of the questions.

Conclusions

Data Analysis. Three subjects who appeared not to understand the task directions and questions were eliminated from the scoring and their data is not included below. These subjects were all approximately 80 years of age and experienced great difficulty (largely due to eyesight) in reading the document and the questions printed on cards.

Results of the question task can be expressed as follows:

(1) How many subjects made remarks indicating that they saw or read the small-print disclaimer during the questioning? Analysis of the question-answer transcripts indicated that 85.2% of the subjects (23 out of 27) gave NO indication whatsoever that they noticed the disclaimer. Conversely, only 14.8% (4 out of the 27) made comments to the effect that they did see or read the disclaimer.

(2) How many subjects indicated they would like to look in the "full plan" or "full contract" for information about "cancellation" that they could not find in the brochure? As noted above, subjects may have used some terms or phrases contained in the disclaimer, or alluded to the "full plan" or "full brochure," without actually having read the disclaimer. Such comments might occur if the subject drew upon (remembered) prior experience with similar documents. We therefore re-checked the transcripts to clarify the basis for statements indicating that the subject would like to see the "full plan," "full brochure," "full document," etc. Analysis of the transcripts showed that 83.4% (21 out of 27) gave NO indication they would like to look in the "full plan," "full brochure," or "full contract" to help answer any of the questions. Conversely, 16.6% (6 out of 27) indicated that they would like to see the "full plan," "full brochure," or "full contract" while answering the questions. However, followup questioning of these six subjects revealed that two of them alluded to the "full plan," not because they saw the disclaimer, but rather as a result of their prior experience. That is, when asked *why* they wished to see the "real" or "full" plan, the two stated that such brochures were "never the whole plan." They did not mention the disclaimer note at all. The remaining four (of these six) were the <u>same</u> four who we previously stated had

seen the disclaimer.

We would assume that if, as the Bunker Hill Company claims, the disclaimer were "adequately" noticeable, then at least 50% of the people in a sample should notice the disclaimer. In our sample, only 14.8% gave evidence that they noticed it. We calculated the standard error of our estimate (14.8%) to determine just how likely it is that at least 50% of the people in a new sample would notice the disclaimer. This analysis indicated that there is a 99.99% chance that fewer than 50% of the people in a new sample would read or notice the disclaimer. Indeed, there is a 95% chance that fewer than 28% will read or notice the disclaimer. (Standard error (SE) of the estimator (p) 14.8% = .0683.) We test this prediction in our second experiment, discussed below.

Is The Experiment A Valid Test Of The Adequacy Of The Disclaimer? The results above clearly suggest that the disclaimer is not very noticeable or salient to readers who have been provided with ample motivation and opportunity to detect it, and whose age, educational and occupational backgrounds are comparable to those of the target population (i.e., retirees of Bunker Hill). However, the argument might be made that the intended, or "normal" readers of this brochure would have both greater motivation and greater opportunity to notice the disclaimer. That is, given that these experimental subjects were not directly (economically) dependent on the insurance plan, we might not expect them to attend to the details as carefully as the actual plan participants would. But upon careful consideration it is doubtful that "normal" readers of the brochure would have greater motivation and opportunity to notice the disclaimer. The reason is that normal readers of an insurance brochure are not usually asked to answer specific questions about the brochure's contents or meaning, including questions about the length of coverage and cancellation. Nor are normal readers *encouraged to search* such texts (as in the present experiment) while obtaining their answers. Thus, to argue that this experiment somehow *prevented* subjects from noticing the disclaimer, or that it provided *less* opportunity than there might be in a natural situation, appears very implausible.

On the contrary, the experiment probably increased the likelihood in comparison with the normal or real-world situation. Indeed, if the disclaimer were performing its putative function, i.e., to alert or warn *careful* readers that information pertinent to their questions about coverage may be found in the official "contract," surely more than 14.8% of the subjects would have mentioned the disclaimer or its contents in response to questioning. The conclusion reached here is that the fine-print disclaimer is clearly inadequate and does not serve its intended function.

Readers' Beliefs About Their Contractual Rights. We can get some insight into reader's beliefs about their contractual rights from answers they gave to particular questions in the experiment. In general, subjects' answers strongly indicated that unless given specific notice that the company reserved the right to cancel, they will believe the benefit plan does cover them "lifetime" and that the company *has no right* to cancel the plan. Evidence for this conclusion is provided by subjects' responses to Questions 1, 3, 5 and 7, analyzed below.

We shall examine results to Question 3 first, since this question most directly addressed subjects' understanding of the length of coverage.

Question 3

"According to your understanding of information in the booklet, for how long do you believe the medical benefit plan covers you? Indicate the length of time below:

- less than one year
- more than one
- more than three years
- lifetime (until I die)
- other

In response to Question 3, 89% (24 out of 27 subjects) stated that they believed the plan covered them lifetime *without qualification*. All of these subjects appear to have based their conclusion on the language used in the beginning of the brochure. Recall the opening paragraph:

In the event of your death, your children and surviving spouse who has not remarried, may continue to be covered.

On the basis of this language, most subjects do appear to have interpreted the brochure to guarantee them "lifetime" coverage under the plan. In addition, of the three subjects who gave answers other than "lifetime," *none* mentioned the disclaimer, the "contract," or the possibility that the company might close, as reasons why the plan did not cover them lifetime. From such a strong, unqualified consensus we might conclude that most readers will believe the company is obligated to provide a "lifetime" plan. But additional evidence

that readers believe Bunker Hill may not cancel the plan is provided by subjects' responses to Questions 1 and 5. These questions also directly probe what subjects believe are their *rights* under the plan. Subjects' responses to Questions 1 and 5 are as follows:

Question 1.

"According to the booklet, under what circumstances can the company cancel all of the medical benefits it describes? If you cannot find an answer to this question, or feel uncertain, explain what you would assume about cancellation of this plan if you were an employee of Bunker Hill?"

- 44% (12 out of 27) concluded either that the company may not cancel the plan under any conditions, or that the company can cancel the plan only if the retiree failed to meet eligibility requirements presented in the brochure – and not otherwise. None of these subjects mentioned either the possibility of a company closing or the fine-print disclaimer in answering the question.
- 48% (13 out of 27) stated that they did not have enough information about "circumstances" to determine whether or not the company could cancel the entire plan. None of these subjects mentioned either the possibility of a plant shut-down or the disclaimer.
- 8% (2 out of 27) stated that the Company could cancel the plan, and mentioned that a company closing might be one reason the Company might do so.

Question 5.

"From your understanding of the booklet, are there any conditions under which Bunker Hill may cancel or take away the entire medical insurance plan given to you here? If you believe there are such conditions, explain what they are. If you don't believe there are such conditions, or if you cannot find them stated, explain what you would assume about cancellation if you were an employee of Bunker Hill."

As we see here, Question 5 is nearly identical to Question 1. Question 1 asks if there are any "circumstances" under which Bunker Hill may cancel, and Question 5 asks if there are any "conditions" under which Bunker Hill may "cancel or take away" the plan. Results for Question 5 are as follows:

- 66% (18 out of 27) stated either that the Company may not cancel the plan, or that the Company may do so only if the retiree fails to meet the eligibility

requirements mentioned in the brochure. None of these subjects either mentioned the possibility that the company might close or the disclaimer in giving their conclusions.

- 26% (7 out of 27) stated that they did not have enough information about any such "conditions" to decide whether the Company could cancel the plan or not. Two (2) of these stated that they wished to see the "contract" alluded to in the disclaimer. One (1) stated she would contact the Office of Employee Benefits, but made no mention of the "contract" nor the "personnel office."

- 8% (2 out of 27) stated that the Company could cancel either if they went out of business or at any time (at Company discretion). Neither subject mentioned the disclaimer, and one stated, "I think it's implied this is a contract" – strong evidence he did not see or heed the fine-print.

In order to clarify the picture of readers' beliefs as suggested by answers to both of these two questions (1 and 5), the answers that each subject made to each question were carefully compared and aggregated. A decision was made to accept the answer (to either 1 or 5) that most directly favored the Company's contention that the brochure provides adequate notice of its rights of cancellation. For instance, if a subject in answer to Question 1 said that the Company could cancel the plan, and then also said in response to Question 5 that he didn't have enough information to decide whether the Company could cancel or not, we only scored the subject's response to Question 1. Conversely, if the subject reported in answer to Question 1 that the Company could not cancel the plan, and also stated in response to Question 5 that she did not have enough information to decide whether the Company could cancel or not, we only scored the subject's answer to Question 5. In this manner, the results presented below reflect the *most conservative estimate* of the number of subjects who believe the Company may not cancel the plan. Taken together, therefore, Questions 1 and 5 present the following picture:

- 59% (16 out of 27) either (1) stated *without qualification* that the Company cannot cancel the plan, or (2) that they could not think of or find any "conditions" for cancellation except those stated in the brochure. Typically, the latter subjects searched unsuccessfully under the section marked "Exclusions" to find information about complete cancellation. None of these subjects indicated that they would like further information or that they would request any. Further, none of these subjects made any remarks about plant closings or shut-downs, and none gave evidence indicating they saw the fine-print disclaimer.

- 18.5% (5 out of 27) either (1) stated that they didn't know whether or not the Company could cancel, or (2) that they could not make any assumptions about cancellation without getting more information. However, none of these subjects mentioned that they would like to see the contract alluded to in the fine-print disclaimer, nor did any subjects mention contacting the "personnel office" mentioned there.

- 11% (3 out of 27) stated that they could not determine whether or not the Company could cancel unless they could see the "real" contract alluded to in

the fine-print disclaimer. These were the same subjects who indicated in the overall the analysis that they saw the disclaimer.

- 11% (3 out of 27) stated that the Company could cancel the plan and offered as one possible reason the fact that the Company might close or shut-down. None made any reference to the fine-print disclaimer.

While not as dramatic as the results for Question 3, these aggregated results support the view that readers of the brochure are likely to believe the plan covers them lifetime and may not be cancelled at will by the Company. Only 11% (3 out of 27) indicated that the Company had the right to take away or cancel the entire plan. Indeed, these results seem especially unfavorable to the Company's position when we remember that most subjects did not heed the fine-print disclaimer (85%); in response to these questions, only 11% (3 out of 27) indicated that they would like to see the "contract." Obviously, unless readers heed the disclaimer, they are more likely than otherwise to believe the plan provides "lifelong" benefits and may not be cancelled.

However, answers to Question 7 might be argued to test the conclusion that subjects believe they have "lifetime," and irrevocable coverage under the plan. Question 7 asked the following:

> According to your understanding of information in the booklet, if Bunker Hill Company decided to go out of business or was forced to close its operations, would you still receive the medical insurance benefits as part of your pension? If you cannot find the answer to this question, or feel uncertain, explain what you would assume would happen to this health benefit plan if the company went out of business or closed?

There is virtually no information within the brochure to help the reader answer this question. The brochure makes no mention of shut-downs or closings or other conditions for complete cancellation. Therefore, as one would predict, most subjects (70%, or 19 out of 26) stated explicitly in response to this question that they could find no information about cancellation or company closings. The absence of such information is significant because it means readers are likely either (1) to rely upon what *other* information in the brochure they tacitly construe as relevant to the question - for instance, the "event of your death" language cited at the beginning of the brochure, or (2) to offer statements merely based on their own prior experience and speculations. For instance, they may imagine hypothetical situations and respond according to the particulars of these situations as they perceive them. Their speculations about what would happen to their benefits in the event of a plant closing are broken down as follows:

- 63% (17 out of 27) speculated that they would lose their benefits if the

company closed or decided to go out of business.

- 22% (6 out of 27) speculated they would be able to keep their benefits. However, none of these subjects mentioned that they would be able to keep their benefits *because* the plan covered them "lifetime."

- 15% (4 out of 27) provided comments indicating they didn't know what to believe. They offered no comments as to what made them uncertain, nor did they indicate what additional information (if any) they would like to have in order to make an assumption.

Taken at face, such results might be argued to indicate that, after all, most subjects do *not* believe the plan provides lifetime coverage. Or, more accurately, because the answers given to Questions 3 and 7 appear to contradict each other, one could argue that the data does not allow us to establish what subjects really do believe about the length of coverage and cancellation rights of the company under the plan. For instance, when compared, the data from Questions 7 and 3 do suggest contradictory conclusions: Do subjects believe the plan's coverage is "lifetime," even if the company closes? *Or*, do they believe that a plant closing would legally terminate an (otherwise) "lifetime" benefit? To illustrate these contradictory implications, here are the remarks of one subject in response to Question 7, on the one hand, and her later response to Question 3, on the other:

(7) "There is no statement on the case of what happens if Bunker Hill goes out of business. I assume this health benefit plan, if the company went out of business or closed, would be the same as many as we have seen heretofore: that people would be out of luck."

versus

(3) "(It's) lifetime, until you die."

In fact, however, the contradiction between the data for Questions 1, 3 and 5, on the one hand, and the data for Question 7, on the other, may not be as significant as it appears. The reason is that Question 7 asks subjects only about what they "assume would happen," and *not* specifically about what they believe the company is *obligated* to do. Moreover, it is highly questionable that "normal" readers of the brochure (i.e., real retirees) would be prompted to consider the plan in the light of a possible plant shut-down - as some of our experimental subjects were prompted to do (by reading Question 7). In fact,

only one of the 27 subjects appears to have considered the possiblility of a shut-down and its effect on the plan without being prompted to do so by Question 7 itself. Further, close examination of the responses of subjects who affirmed they would "lose their benefits" in the event of a shut-down reveals that they had markedly different interpretations concerning what sort of evaluation the question was asking them to make:

- Of the 17 subjects who stated they "would lose their benefits," most (70%, or 12 out of 17) did not indicate any specific reason *why* they thought a company closing would cause them to lose their benefits. The comments of some of these subjects suggested a pessimism concerning the workings of the legal system in protecting their rights. They made no comments to the effect that they would lose their benefits *because* the company was not legally obligated.

- 12% (2 out of 17) stated that the reason they would lose their benefits is that the company would not have the money to pay for the insurance premiums. In other words, these subjects imagined a scenario in which the Company was completely bankrupt, or completely without resources. They did not specifically indicate that the company was not legally obligated.

- 18% (3 out of 17) implied that they would lose their benefits *because* the brochure provided no explicit statement about what would happen to the plan if the company closed. That is, they appeared to assume that the *absence* of an explicit statement in the brochure meant that the Company could not be held liable. Two of these three subjects also commented that the reason they would lose their benefits was that in their experience only pension plans (and not health insurance plans) were protected by the government.

Given this analysis of the underlying reasons for subjects' responses, it would be mistaken to interpret the results for Question 7 as necessarily "contradicting" or superseding the results for Question 3. On the contrary, most of these subjects (82%, or 14 out of 17) who "predicted" a loss of benefits provide no evidence that they are making a specific judgment about the company's *contractual obligations* for coverage under the plan. Most vaguely describe what they speculate "would happen" to their benefits in a shut-down situation. The evidence further suggests that at least some subjects are imagining a situation in which the company simply has no money left to pay and therefore cannot be made to do so, regardless of any legal liability. In short, "You can't squeeze blood from a turnip."

In contrast, we would argue that Questions 1, 3 and 5 more directly probe *what subjects believe about their contractual rights - and the Company's legal liability* under the plan. The responses reviewed earlier to Questions 1, 3 and 5 do suggest that readers of the brochure believe the company is *obligated* to cover them lifetime and that the company may not cancel the plan so long as enployees meet participation criteria.

To summarize, the question motivating the first experiment might be expressed as follows: What does the brochure *as it currently exists* prompt readers to believe about their

contractual rights? If we omit the possibly biasing influence of Question 7 (which introduces the scenario of a shut-down that is nowhere even hinted in the brochure), the answer seems to be that most subjects will believe they are covered "lifelong." Most subjects believe the entire plan can be cancelled only if the retiree fails to meet one or more of the eligibility requirements, and not otherwise. The evidence that they are likely to believe otherwise is very weak by comparison.

However, given the uncertain nature of many subjects' responses to Question 7, we decided to conduct a second experiment similar to the first. In particular, we wished to determine more precisely the nature of readers' beliefs about the Company's contractual obligations under specific shut-down conditions. This second experiment, its purpose, methods and results are reported below.

Experiment Two

Purpose

Like the first experiment, this experiment also investigated whether or not readers are likely to notice the fine-print disclaimer in the brochure. The overall goal was (again) to determine what readers believe about their contractual rights and coverage based upon information in the brochure. However, in this experiment we also wished to determine what readers would infer about their plan benefits in the event of a company closing *provided the company still had the financial resources to support the plan.* We therefore substantially modified the language of Question 7; in addition, we modified the language used in Questions 1, 3 and 5 (see discussion in **Method** section below).

Subjects

Subjects were again recruited for a "reading experiment" and paid $8.00 for participation. A total of 28 subjects participated (14 Males, 14 Females). This subject population was also broadly matched with the population of readers for whom the brochure was originally intended. All were at least 40 years of age, ranging from 40 - 80, with a mean age of 51.7 years (Males, Average = 47.9; Females, Average = 55.6). Occupations of subjects again varied, and no subject was allowed to participate who had previously worked for an insurance company or in a benefits/retirement office (see Appendix 5 for list of subjects' occupations). Subjects were again excluded who might have a professional understanding of retirement or medical insurance plans. Subjects' formal schooling ranged from 9 to 17

years. The avearge number of years of formal schooling was 12.2 years (Males, Average = 12; Females, Average = 12.4).

Method

Experimental procedures, including instructions to subjects and data collection techniques, were the same as in Experiment One. As noted above, the only difference arises in the language used in Questions 1, 3, 5 and 7. The changes to Questions 1 and 5 are very slight, and consist in adding to the beginning of these questions the sentence, "Assume you are a retiree who fully meets the eligibility requirements for this insurance." This sentence was added so that subjects would look for "conditions" or "circumstances" for cancellation (or exclusion) other than those arising from ineligibility. The changes to Questions 3 and 7 are more substantial, as follows:

Questions Used In Experiment One.

(3) According to your understanding of information in the booklet, for how long do you believe the medical benefit plan covers you? Indicate the length of time below.

- less than one year
- more than one year
- more than three years
- lifetime (until I die)

(7) According to your understanding of information in the booklet, if Bunker Hill Company decided to go out of business or was forced to close its operations, would you still receive the medical insurance benefits as part of your pension? If you cannot find the answer to this question, or feel uncertain, explain what you woulld assume wuld happen to this health benefit plan if the companny went out of business or closed.

Questions Used In Experiment Two.

(3) Assume you are a retiree who fully meets the eligibility requirements for this insurance. According to your understanding of information in the booklet, for how long do you believe the insurance plan is obligated to cover you (as a retiree)? Indicate the length of time below: (*same list as used in Experiment*

One, above.)

(7) Assume you fully meet the eligibility requirements for this insurance. Now suppose Bunker Hill closed its operations. If (after closing) they still had the money to support the insurance plan described here, would you still be entitled to receive plan benefits? As best you can, answer the question based on what information you find in the brochure.

Recall that in Experiment One subjects appeared to make varying interpretations of Question 7. In particular, we saw that they did not offer specific comments about the Company's *contractual obligations*, but instead appeared to offer general comments about the "fate" of their benefits. Here we have narrowed the question so as to focus explicitly on the Company's contractual obligations under a specific set of circumstances, namely, the Company has shut-down but still has the financial resources to continue the plan.

Conclusions

How many subjects made remarks indicating that they saw or read the small-print disclaimer during the questioning task? Results of the second experiment provide powerful confirmation of our first prediction concerning the likelihood that subjects will notice, read and process the information contained in the fine-print disclaimer. Recall that our earlier analysis indicated a 99.99% chance that fewer than 50% of the subjects in a new sample would notice the disclaimer. In fact, in this experiment, only 3.6% (1 out of 28) made comments to the effect that they read or "processed" the disclaimer; 96.4% gave NO indication whatsoever that they noted the disclaimer.

Readers' Beliefs About Their Contractual Rights. To get insight into readers' beliefs about their contractual rights, we will again examine subjects' responses to Questions 1, 3, 5 and 7. In general, responses to Questions 1, 3 and 5 suggest that most readers, unless given explicit statements to the contrary, are likely to believe that the Company is obligated to cover them lifelong; most subjects believe the Company may cancel the plan only if the retiree fails to meet eligibility criteria and not otherwise. Let us review the evidence provided by each question.

In response to Question 3, 75% (21 out of 28) indicated that the Company was obligated to cover them "lifetime," *without qualification.* This figure is similar to that obtained in

Experiment One (89%). Of the remaining 25% (7 out of 28), only one subject indicated that the company had the right to "make changes" later on. Yet none of these subjects mentioned the disclaimer as a reason for suspecting they did not have "lifetime" coverage. For example, of these seven subjects, 3 indicated coverage extended "more than one year," 1 indicated coverage extended "less than one year," and 3 stated "other," commenting that they didn't know how long they were covered or that they could find no information about length of coverage in the brochure. Subjects who responded "lifetime" appeared to depend upon the language used at the beginning of the brochure (as discussed earlier in this report). In lieu of perceiving the fine-print disclaimer, then, it appears likely readers will conclude the Company is obligated to provide "lifetime" coverage to its retirees.

Responses to Questions 1 and 5 also support this conclusion. We used the same conservative scoring procedure for aggregating data for Questions 1 and 5 here that we used in Experiment One. These aggregated results are as follows:

- 68% (19 out of 28) either (1) stated *without qualification* that the Company cannot cancel the plan, or (2) stated that they could not think of or find any "conditions" for cancellation except those stated in the brochure. As in Experiment One, these subjects also searched unsuccessfully in the section marked Exclusions for conditions affecting cancellation of the entire plan. None of these subjects made remarks indicating that they had seen the fine-print disclaimer, nor did any of them mention the possibility of a company shut-down.

- 21% (6 out of 28) either (1) stated that they didn't know whether or not the Company had the right to cancel, or (2) stated they could not make any assumptions without more information. However, none of these subjects mentioned the fine-print disclaimer or contacting the personnel office to see the official "contract."

- 4% (1 out of 28) stated that they could not determine whether or not the company could cancel unless they were able to see the real "contract" alluded to in the fine-print disclaimer. This was the only subject to have noted the disclaimer in the course of the experimemt.

- 7% (2 out of 28) stated that the Company could cancel the plan, and offered as reasons the possibility that the plant might shut down, or simply that the Company could do so at its discretion. Neither subject mentioned the disclaimer.

These percentages are similar to those obtained in Experiment One, with a slight increase here in the number of subjects who believe the plan may not be cancelled (Experiment One = 59%, Experiment Two = 68%). Only a very small percentage (7%) state that the Company has the right to cancel the plan, and only one subject mentions a shut-down as a viable condition for doing so. When combined with the results for Question 3, these results for Questions 1 and 5 again indicate that most readers of the brochure are quite likely to conclude that the plan covers them "lifetime," and that the Company may not cancel the

plan.

The results obtained for Question 7 in this experiment are strikingly different than those obtained for Question 7 in Experiment One. Recall that we changed the language in Question 7 so as to focus on the Company's obligations in the event that they shut down *but still had the money to pay for the plan.* Here, the results obtained for Question 7 appear much more consistent with the results for Questions 1, 3 and 5. The results for Question 7 are as follows:

- 43% (12 out of 28) provided comments indicating they did not know what to believe about the Company's obligation. They did not provide any comments as to what made them uncertain, other than the lack of any mention of shut-downs in the brochure. None mentioned the fine-print disclaimer or the "contract" in the personnel office, etc.

- 39% (11 out of 28) stated that the Company *was obligated* to continue the plan if, despite the shut-down, financial resources for supporting the plan were still available. None commented on the Company's contractual obligation in the event that the Company closed and had *no* resources left to continue the plan.

- 11% (3 out of 28) stated that the Company was not obligated to continue to pay for the plan, even if the Company had the resources to do so.

- 7% (2 out of 28) stated that most likely some government agency or other source would continue to pay their insurance premiums (in lieu of the closed Company), but made no comment regarding whether or not they felt the Company was *contractually obligated* to pay.

While these results by themselves do not strongly support the argument that readers are likely to conclude the Company to be liable, they clearly *fail* to support the Company's contention that the brochure provides adequate notice of their cancellation policy. None of the 28 subjects answering this question ever mentioned the disclaimer and its reference to the "official" contract. Indeed, 82% of the respondents to Question 7 either do not know what their rights are in a shut-down situation, or else believe the Company is obligated to continue the plan if the Company has the funds to do so. In contrast, only 11% conclude that the Company is not obligated to pay under these conditions. As we noted in Experiment One, subjects have no information in the brochure upon which to base their inferences about conditions that would completely cancel the plan, let alone specific conditions governing shut-down situations.

To summarize, we must emphasize again the basic purpose of these experiments: to find out what readers will believe about their contractual rights under the plan if given the brochure as it currently exists, and no other information. We have already presented strong evidence in both experiments that readers fail to even *see* the fine-print disclaimer, which the Company contends provides adequate notice (albeit indirectly) of the Company's rights

and obligations. A disclaimer so frequently overlooked can hardly be deemed "adequate," and reader's difficulties here seem to justify completely the ERISA provision prohibiting the use of fine-print when explaining "exceptions, limitations, reductions or restrictions" of plan benefits. In lieu of perceiving this disclaimer, the results for Questions 1, 3 and 5 in our second experiment again suggest that most readers are more likely than not to construe the plan as covering them "lifelong." Moreover, this conclusion is certainly not contradicted by our analysis of responses to Question 7. Readers apparently draw this "lifetime" inference based upon the initial language of the brochure, which discusses what happens in the event of the retiree's death. The results of the second experiment also suggest that most readers are more likely than not to believe the Company may not cancel the plan - except when the retiree fails to meet stated eligibility requirements.

In view of both experiments, therefore, we conclude that the present document violates the ERISA provisions cited at the beginning of this report in several ways:

1. The brochure neglects to state the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." Nowhere does the brochure tell the employee that the company reserves the right to cancel the plan.

2. By using fine-print and poor positioning, the brochure renders obscure the "limitations" that the company claims to be in effect, i.e., the right to cancel the plan at the company's discretion.

3. The brochure is not designed "in a manner calculated to be understood by the average plan participant." As the experimental results ndicates, there is a 99% chance that fewer than half of future subjects would read or notice the fine-print disclaimer.

4. The brochure is not "sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." As our data above indicate, because readers do not notice the fine-print disclaimer, they must form their judgments about rights and obligations, as it were, by proxy, using other language in the summary as a guide.

Can The Brochure Be Improved? A linguistic analysis of the wording of the disclaimer suggests several potential sources of confusion, and several improvements to be made. The most serious, and likely, source of confusion is use of the term "contract" itself. In context, it is not clear *what* particular "contract" is meant - is it the contract between Bunker Hill and its employees (i.e., the collective bargaining agreement), *or* the contract between Bunker Hill and Blue Shield of Idaho? For instance, during informal questioning of subjects (during debriefing,) when the disclaimer was pointed out, some subjects stated that

the disclaimer referred to the "labor contract" or "bargaining agreement," some stated that the contract was between Blue Shield and Bunker Hill, and others appeared confused or didn't know. In addition, three subjects stated flatly during experimental questioning that the brochure itself *was* a contract, obvious evidence that they did not heed the disclaimer. More precise experimentation is needed to determine exactly what readers do infer about the use of the term "contract" in the disclaimer.

A second likely source of confusion in the disclaimer is the term "illustration." In context, it is not clear what this term means. May an "illustration" (of a contract) contain inaccuracies, or merely be incomplete, or both? Readers are not likely to know what to infer from such a term, in particular, to what extent this term serves to qualify the "truth value" of the information presented in the brochure. Along with the meaning of the term "contract" in context, the meaning of the term "illustration" also merits formal experimentation.

A third possible source of confusion is the use of the pronoun "This" at the very beginning of the disclaimer. In context, it is not clear what the pronoun "This" refers to: does it refer to the *entire* brochure, or to only the section immediately preceding the disclaimer? This pronoun usage is vague, since the scope or breadth of reference indicated for "This" cannot be readily verified by the reader. In other words, the reader may ask, "*What thing* is not a contract..?" To be more clear, a noun referent following "This" should be provided. For example, "This document..." or "This section..."

These linguistic observations do not necessarily prove all readers will be confused about the meaning of the disclaimer - if they do see and read it. However, they do suggest that without additional interpretation provided on the part of the Company, readers will not be able to make clear inferences about the meaning of the disclaimer. These potential problems point up the need for more research. They certainly do not support the view that the present disclaimer is adequately written. Moreover, from a professional document-designer's point of view, these problems with the terminology used in the disclaimer are *easily avoidable*, simply by observing basic semantic and grammatical principles. Thus, in addition to noting that the typeface and position of the disclaimer are inadequate, we note that the use of language (for purposes of clear, unambiguous reference) within the disclaimer itself could be much improved.

There is a robust literature to support the belief that the present disclaimer could be made much more noticeable.[2] A variety of studies in document design have shown that

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[2] Document Design: A Review Of The Relevant Research Daniel B. Felker, Ed. (Washington, D.C.: Document Design Project, American Institutes For Research and National Institute of Education, 1980).

placing information closer to the beginning of such functional documents, and increasing the size of typeface, are quite likely to make that information more noticeable to the reader.[3] For instance, Appendix 6 contains a sample of a disclaimer placed in a Continental Insurance Company brochure at the beginning. Note that this disclaimer, which is similar to the one in the Bunker Hill document, is prominently displayed in a box, and printed in the same size typeface as the rest of the text (outside the box). Indeed, the wealth of research on the prominent display of information in texts is one basis for the ERISA provisions citsd in the beginning of this report.

Summary Plans And Plain Language Laws: Issues For Further Research

We began this report by noting that ERISA does not specifically prohibit the use of contract disclaimers in summary plan documents. While we would not yet recommend, merely on the basis of these two experiments, that ERISA include such a prohibition, we think the idea merits more serious consideration than it has so far been given. There is a clear reason why. As the court implied in *Zittrouer v. Uarco* 582 F. Supp. 1471 (1984) (see p. 5 above), allowing the any use of disclaimers, even when they are fully explicit and properly printed and formatted, contradicts the *principle of disclosure* underlying ERISA. To publish summary plans that include complex details about coverage (e.g., types of services, percentage of deductible costs, and so on) appears to lead many non-legally trained readers to believe that such plans state contractual terms - that they are "official" disclosures. As we noted, a number of our subjects in the experiments remarked that the summary *was a contract*. But contract disclaimers directly subvert the notion of disclosure. They say, in effect, either "Some things stated here are not true," or else "Some things which are true (of this plan) are not stated here."

Contract disclaimers thus place normal readers' expectations about disclosure in a double-bind, and send, at best, an ambiguous message. Recall our analysis of the meaning of the term "illustration" as used in the Bunker Hill disclaimer: is an "illustration" of a contract a *representation* or *misrepresentation* of a contract? Readers are left to doubt if *anything* in the summary is true, and the burden of *finding out* what is true is thrust back onto them in a clearly disadvantageous manner. The technicalities of "deductibles" and the "extent of coverage" offered by summary plans are difficult enough to understand without introducing this kind of linguistic guessing game into the situation. As noted in *Hillis v. Waukesha Title Co., Inc.* 576 F. Supp. 1103, (1983), the point of ERISA was to eliminate this sort of

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[3] Guidelines For Document Designers Daniel B. Felker, Ed. (Washington, D.C.: Document Design Project: American Institutes For Research, 1980). Here, in particular, see Chapter II - C, "Typographic Principles."

guessing game, and to enforce "a more *particularized* form of reporting." Clearly, the use of contract disclaimers works directly against "particularized reporting" as contract disclaimers almost invariably function to remove "details" from the view of the reader.

The problem remains, of course, as to how summary plans can be written so as to provide full and accurate representations while at the same time be comprehensible to non-lawyers. Here there are many issues for document design researchers to investigate. For instance, what kind of format, style and usage is most appropriate for these documents? What kind of prefatory material (or "preview") would best *prepare* the reader for the content and structure of the document, and help him or her to *use* the information it contains? Plainly, mere expert "opinions" about "clarity" (or lack thereof) in such documents are not sufficient for dealing with these issues, and we hope that the present report shows the value of taking an experimental approach to these issues in the future.

Appendix 1.
Copy Of Bunker Hill Company Summary Plan

BUNKER HILL COMPANY

SUMMARY OF MEDICAL - SURGICAL -HOSPITAL BENEFITS FOR RETIRED EMPLOYEES, SURVIVING SPOUSES OF RETIRED EMPLOYEES AND THEIR ELIGIBLE CHILDREN

August 20, 1981

Employees receiving a pension from the Bunker Hill Company are eligible for the benefits outlined in this booklet. Your spouse and children, at the time of your retirement, are also eligible. In the event of your death, your children and surviving spouse who has not remarried, may continue to be covered.

Children are defined as follows:

(1) Unmarried under the age 19 (includes natural children, adopted children, stepchildren, foster children, or children in the process of adoption);

(2) Unmarried, extended to age 23 while a full-time student;

(3) Unmarried and incapable of self-support by reason of mental retardation or physical handicap before attaining age 19.

PLAN BENEFITS

The following provides a brief outline of the benefits provided by the Plan. It is important to remember that this is a service plan administered by the Medical Service Bureau of Idaho, Inc. All benefits paid to physicians are based on Medical Service Bureau of Idaho rates and not necessarily those charged by the doctor where you live.

I. HOSPITAL BENEFITS

a) Room & Board — The Plan pays the hospital's usual charge for room and board and general nursing care in a semi-private room for up to 365 days for any one illness or injury.

b) Miscellaneous Hospital Expenses — The Plan pays 100% of the reasonable charges for Hospital services and supplies such as use of operating room, recovery room, drugs, dressings, X-rays, lab tests, anesthesia, etc.

c) Emergency Room Care — The Plan pays 100% of the reasonable charges for emergency care required for accidental injuries provided treatment is rendered within 48 hours after the accident.

II. PROFESSIONAL BENEFITS

The following benefits are paid in full to a participating physician (one who has agreed to accept Medical Service Bureau's payment as payment in full for his services). A non-participating physician (M.D.) will be paid at the rates customarily paid to participating physicians and may not necessarily be accepted as payment in full. For those of you not living in the service area, please remember that payment is based on Medical Service Bureau of Idaho rates.

a) X-ray, radium, radioactive isotope therapy

b) Outpatient diagnostic X-ray and laboratory charges, including electrocardiograms and basal metabolism tests

c) Surgery and Anesthesia charges

d) Doctors visits
In Hospital - Pays starting with the first visit for an accidental injury or illness
Home or Office - Pays for up to 50 calls a calendar year for accidental injuries only (illness conditions payable under Major Medical).

III. AMBULANCE BENEFITS

The Plan pays 100% of the reasonable charges for necessary ambulance service, including air ambulance up to 850 miles each year.

IV. APPLIANCES AND BRACES

The Plan pays 100% of reasonable charges for necessary orthopedic appliances and braces not designed for permanent use for accidental injuries.

V. MAJOR MEDICAL

DEDUCTIBLE: $50.00 per person, each calendar year.

BEST COPY AVAILABLE

[illegible] during the last three months of a calendar year may be applied against the deductible for the next calendar year.

MAXIMUM: $50,000 during a patient's lifetime, with $1,000 annual restoration.

COVERED EXPENSES: The following charges are considered covered Major Medical expenses and will be paid after the deductible:

100% of usual, customary and reasonable charges for professional care by a participating physician; 90% of usual, customary and reasonable charges for services of a non-participating physician; 50% of usual, customary and reasonable charges for participating and non-participating physicians for out-patient services for mental or neuro-psychiatric conditions (including alcoholism or drug addiction), to a maximum per patient of $300 per year.

90% of reasonable charges for special nursing care by registered nurses or licensed practical nurses, or physiotherapy by a registered physiotherapist when such services are ordered by the attending physician (licensed doctor of medicine) except for services rendered by a relative, or by a person who normally resides in the member's home.

90% of reasonable charges for prescription drugs and medicines properly identified and listed in the U.S. Pharmacopoeia and/or National Formulary, and ordered in writing and dispensed by a licensed pharmacist or physician, for the specific and direct treatment of a covered disability; insulin and diabetic supplies.

90% of reasonable charges for the initial cost of artificial limbs, eyes and braces, oxygen and equipment rental, rental of wheel chair, hospital type bed and similar necessary medical equipment.

90% of reasonable charges for hospital benefits for cases of dental or oral surgery when performed by a doctor of dental surgery (DDS) and upon certification by a doctor of medicine that hospitalization is necessary because of non-dental health impairments such as hemophilia, heart disease, etc. Charges by the dental surgeon are not covered except for care and treatment of fractured jaw.

90% of reasonable charges for hospital room and board and ancillary services, cardiac or intensive care unit, out-patient hospital services for the diagnosis or treatment of covered illnesses or injuries.

EXCLUSIONS

Benefits are not provided for: (1) care provided in a government institution; (2) illness or injury covered by Workmen's Compensation; (3) illness or injury resulting from war or national disaster; (4) routine physical examinations; (5) dentistry; (6) refractions and eyeglasses; (7) hospitalization simply for diagnosis or rest care; (8) cosmetic surgery primarily for beautification; (9) podiatrists, except for medical and surgical treatment of disease and injuries of the foot; (10) sex transformations or reversal of sterilization; (11) dentistry (except care and treatment of fractured jaw); (12) visual training; hearing aids, special type equipment such as humidifiers, vaporizers, exercise equipment and machines, heating pads, air conditioners, air filtration units, contour chairs and beds, blood sugar machines, insulin air guns.

SPECIAL PROVISIONS FOR COVERED PERSONS ON MEDICARE

If you or your spouse is entitled to benefits under Medicare for an illness or injury which is also covered under this Plan, the benefits payable under this Plan shall be reduced by the amounts paid by Medicare.

While this Plan will not pay for expenses covered by Medicare, it will pay for example, the Part A hospital deductibles, the Part B medical deductible and the 20% Part B coinsurance for physician services and outpatient X-ray and lab tests.

HOW TO FILE A CLAIM

When you become eligible for the Retiree Medical plan you will receive an identification card from the Medical Service Bureau. This card should be presented to the doctor or hospital prior to a service being rendered. All payments to participating doctors and hospitals will be made direct to them. If a non-participating doctor or hospital is used you may be asked to pay the bill yourself and in that case benefit payments will be made to you. All claims are to be filed within 90 days of the date expense is incurred.

NOTE: This is an illustration of benefits — not a contract. For details of all benefits, limitations and exclusions, you may see a copy of the contract at the personnel office of the Bunker Hill Company in Kellogg.

All questions regarding benefits should be referred to the Office of Employee Benefits Administrator of The Bunker Hill Company or to the Medical Service Bureau of Idaho, Inc., P. O. Box 1108, Lewiston, Idaho 83501, Phone (208) 746-2671.

PLAN ADMINISTRATOR:

Appendix 2.
Opinion in Bower v. Bunker Hill

A claim grounded in state law for wrongful termination for public policy reasons poses no significant threat to the collective bargaining process; it does not alter the economic relationship between the employer and employee. The remedy is in *tort*, distinct from any contractual remedy an employee might have under the collective bargaining contract. It furthers the state's interest in protecting the general public — an interest which transcends the employment relationship. See New York Telephone, 440 U.S. at 533."

4. The Effect of the Arbitration.

[4] Lucky Food Stores also argues that Garibaldi should be barred from asserting a remedy in court because he chose to arbitrate his grievance, and attempts to characterize Garibaldi's action as an appeal from an arbitration award for statute of limitation purposes. This argument is not persuasive.

In Alexander v. Gardner-Denver Co., 415 U.S. 36, 7 FEP Cases 81 (1974), the Supreme Court held that the plaintiff could pursue his remedy under Title VII of the Civil Rights Act even though he previously had submitted his grievance to arbitration, alleging in the arbitration that he was discharged on the basis of race and the arbitrator had found that he was "discharged for just cause." 415 U.S. at 42. "In filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not violated merely because both were violated as a result of the same factual occurrence." 415 U.S. at 49-50. The Court, recognizing that arbitrators look to the "industrial common law of the shop" and "[have] no general authority to invoke public laws that conflict with the bargain between the parties ...." 415 U.S. at 53, was unwilling to foreclose the employee from asserting rights created independently of the collective bargaining agreement." We find the same considerations relevant here as in the preemption context — the state law may protect interests separate from those protected by the NLRA provided the interests do not interfere with the collective bargaining process." Since we find that the state claim is not preempted, we do not find the prior arbitration a barrier.

IV

CONCLUSION

We hold that the claim for wrongful termination based on state public policy is not preempted by section 301 of the LMRA. Removal was improper. Because the district court had no jurisdiction over this case, we reverse and remand to the district court with instructions to remand to the California state court.

REVERSED and REMANDED.

BOWER v. BUNKER HILL CO.

U.S. Court of Appeals, Ninth Circuit (San Francisco)

BOWER v. THE BUNKER HILL COMPANY, No. 83-3634, February 14, 1984

CONTRACTS

Plant closing — Retirement medical insurance — Vested benefits — Summary judgment ► 116.408 ► 122.40

Federal district court erred in entering summary judgment in action alleging that employer improperly discontinued retirement medical insurance when it ceased operations, where num-

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* A recent decision supports the result we reach in this case. In Machinists Automotive Trades District Lodge No. 190 v. Utility Trailer Sales, 141 Cal. App. 3d 80, 190 Cal. Rptr. 68 (1st Dist.), appeal dismissed — U.S. —, 104 S.Ct. 529 (1983), the California Court of Appeals held that an employee's statutory right of indemnity by his employer under state law was not preempted by federal labor law. The court said,

> the fact that a matter is a subject of collective bargaining does not preclude the state from adopting standards to protect the welfare of the workers .... Bowser's statutory right to indemnity is independent of any contractual right.

190 Cal. Rptr. at 100, citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 52, 7 FEP Cases 81 (1974).

The Supreme Court dismissed the appeal for want of a substantial federal question. — U.S. —, 104 S.Ct. 529. A dismissal for want of a substantial federal question is a decision on the merits. Hicks v. Miranda, 422 U.S. 332, 344 (1975).

* The fact that Alexander's additional remedy was one created by *federal* rather than *state* law does not diminish the force of the argument. First, the focus of Alexander was the preclusive effect of the arbitration, not the preemptive effect of federal law — a supremacy clause issue. Second, the Supreme Court held in Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714, 52 LRRM 2889 (1963), that a discrimination action under Colorado law was not preempted by the RLA. See 372 U.S. at 736. The Supreme Court of Oregon has recognized the implications of Alexander for preemption. See Vaughn v. Pacific Northwest Bell Telephone Co., 289 Or. 73, 88, 611 P.2d 281, 289, 106 LRRM 2083 (1980). See also Comment, supra note 7 at 658 n.134; Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, 62 Va.L.Rev. 481, 530 n.216; Note, A Common Law Action for the Abusively Discharged Employee, 26 Hast.L.J. 1435, 1467-63 (1975); Comment, Intimations of Federal Removal Jurisdiction in Labor Cases: The Pleadings Nexus, 1981 Duke L.J. 743, 750-56.

* See Comment, supra note 7 at 658.

ber of facts in dispute cumulatively create ambiguities whether benefits were vested under collective bargaining contract. Contract language does not speak to issue whether insurance benefits were vested; extrinsic evidence suggests ambiguity in contract; management allegedly made misleading representations to employees and union representative concerning lifetime insurance benefits for retirees; benefits were provided during strike, but there is no evidence on record whether employer and union had reached agreement governing provisions of benefits.

Appeal from the U.S. District Court for the Eastern District of Washington. Vacated and remanded.

Daniel P. McIntyre, Pittsburgh, Pa., for appellants.

Eugene I. Annis (Lukins & Annis, P.S.), Spokane, Wash., for appellee.

Before SNEED, NELSON, and REINHARDT, Circuit Judges.

Full Text of Opinion

NELSON, Circuit Judge: — Former employees of The Bunker Hill Company brought suit alleging that the Company improperly discontinued retirement medical insurance when it ceased operations. The district court granted defendant's motion for summary judgment on the ground that these insurance benefits were not vested. The employees appeal this ruling. We vacate the grant of summary judgment and remand for additional proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

The Bunker Hill Company ("Bunker Hill") began a pension plan for its employees in 1940. In 1956, negotiations with the hourly employees' union resulted in a medical insurance plan for all unionized employees. Although not covered by the union agreement, non-union employees have always received benefits identical to those provided union members.

Since 1956, a number of unions have represented Bunker Hill employees, and a number of labor-management contracts have been negotiated. Generally, the contracts were renegotiated every three years and benefits for retirees were continually improved. From 1956 through 1972, each contract granted retired employees medical insurance identical to that provided active employees. The contracts incorporated by reference a separate insurance schedule.

In 1972, the United Steelworkers of America began to represent Bunker Hill employees. The labor-management contracts negotiated by the Steelworkers no longer incorporated an insurance agreement by reference. Instead, the insurance plan was an independent agreement, appended to the labor-management contract. The insurance plan no longer expired when the labor-management contract expired, but rather contained an independent expiration clause that was identical to the labor-management contract expiration clause. Retirement benefits were discussed in neither of these two documents, but were set forth in a third paper — a memorandum of agreement drafted at the conclusion of bargaining. This memorandum ran for a term of three years and granted insurance benefits that ran for an unspecified term.

The 1977 and 1980 labor agreements echoed the form of the 1973 agreement. A letter mailed to all employees described insurance coverage in terms of a "lifetime" maximum, and appellants argue that a summary description of the company's insurance plan implied that insurance coverage lasts for the life of retired employees.

On August 25, 1981, Bunker Hill announced that it was discontinuing its operations. Shortly thereafter, each active employee was notified that his medical insurance coverage would end on April 5, 1982. Retired employees were told that their medical coverage would end on May 15, 1982. Bunker Hill continues to pay all retirement benefits except for the medical coverage. It is retirement medical insurance, alone, that is the focus of this lawsuit.

On June 2, 1982, a number of pensioners filed this action in the Eastern District of Washington. Defendant's Motion for Summary Judgment was granted on January 14, 1983, and it is this ruling the plaintiffs appeal.

DISCUSSION

I. STANDARD OF REVIEW.

This court reviews *de novo* decisions granting summary judgment. Bank of California, N.A. v. Opie, 663 F.2d 977, 979 (9th Cir. 1981). Summary judgment is properly granted only if a "the contract provision in question is unambiguous." Castaneda v. Dura-vent Corp., 648 F.2d 612, 619, 107 LRRM 3179 (9th Cir. 1981). A dispute over a material fact necessary to interpret the contract may result in ambiguity. See National

Union Fire Insurance of Pittsburgh, Pennsylvania v. Argonaut Insurance Co., 701 F.2d 95, 97 (9th Cir. 1983). Thus, Bunker Hill must demonstrate that the documents underlying this lawsuit unambiguously establish a medical insurance plan limited to a three year term. All "possible inferences from the record" must be drawn in the retirees' favor. Gee v. Tenneco, Inc., 615 F.2d 857, 859 (9th Cir. 1980).

The legal framework of this dispute is fairly straightforward: if the pensioners' medical insurance constituted a vested benefit, that benefit could not be ended without the pensioners' consent. See, e.g., Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 181 n.20, 78 LRRM 2974 (1971). If each collective bargaining agreement unambiguously limited medical benefits to the term of the agreement, no benefits were vested. See, e.g., Turner v. Local Union No. 302, International Brotherhood of Teamsters, 604 F.2d 1219, 1225, 102 LRRM 2548 (9th Cir. 1979) (hereinafter cited as "Turner"). The sole question, then, is whether the collective bargaining agreements unambiguously limited the term of the medical benefits.

II. THE EXISTENCE OF MATERIAL ISSUES OF FACT RENDERS SUMMARY JUDGMENT IMPROPER.

The Sixth Circuit, presented with a similar issue and similar evidence, recently held that the collective bargaining agreement created a vested right to lifetime insurance benefits for retirees and affirmed the entry of summary judgment for the union. International Union, United Automobile, Aerospace & Agricultural Implement Workers v. Yard-Man, Inc., 716 F.2d 1476, 114 LRRM (BNA) 2489 (6th Cir. 1983). Here, however, appellants do not seek an order directing an award of summary judgment in their favor. They claim only that there are material issues of fact that precluded the district court from granting summary judgment to appellees. It is clear from the record that there are a number of facts in dispute in the case before us. Cumulatively, those facts create ambiguities in the contract that render summary judgment improper. See National Union Fire Insurance of Pittsburgh, Pennsylvania v. Argonaut Insurance Co., 701 F.2d 95, 97 (9th Cir. 1983).

A. *The Contract Language Does Not Speak to the Vesting Issue.*

The retirement medical insurance plan does not have an explicit expiration date. The labor-management agreement that endorses the plan does have an expiration date, but the insurance program itself is not necessarily bound by this date. See, e.g., E.L. Weigand Division v. National Labor Relations Board, 650 F.2d 463, 107 LRRM 2112 (3d Cir. 1981) (sickness and accident benefits are not limited to term of labor-management agreement), cert. denied, 455 U.S. 939, 109 LRRM 2778 (1982). Thus, the contractual language does not explicitly address the issue before us.

Inferences drawn from parallel contractual provisions provide no additional insights. In some instances, provisions that were to outlast the term of the labor-management agreement were made to do so explicitly. In other instances, however, provisions that were to expire at the end of the term of the labor-management agreement were made to do so explicitly. Accordingly, no inference can be drawn from the absence of an expiration date on the retirement insurance documents. Unable to resolve this lawsuit on the basis of contractual language, we look to extrinsic evidence to determine if summary judgment was properly granted in this case. Cf. United States v. Erickson Paving Co., 465 F.2d 396, 399-400 (9th Cir. 1972) (parol evidence only inadmissible where not essential to interpreting contract).

B. *Extrinsic Evidence Suggests an Ambiguity in the Contract*

1. *Summary Plan Descriptions*

A small booklet distributed to all employees described Bunker Hill's retirement benefit plan. This "Summary Plan Description" stated only one eligibility requirement for receiving insurance: that the applicant be "receiving a pension from the Bunker Hill Company." Since the pension is lifelong, employees may have viewed the related insurance also to be a lifelong benefit. Moreover, the summary description assures pensioners that, upon their death, their "children and surviving spouse may continue to be covered." Such language suggests that retirement insurance benefits may not have been limited to the duration of the collective bargaining agreement.

The district court discounted these statements because a disclaimer printed on the last page of the summary description specifically noted that the booklet was "an illustration of benefits — not a contract" and instructed employees to "see a copy of the contract at the Personnel Office" for a full expla-

nation of insurance benefits. The district court found that no reasonable person could infer from plan descriptions limited in this manner that the booklet created contractual rights.

Both the summary plan descriptions and the disclaimers are required by the Employee Retirement Income Security Act, 29 U.S.C. §§1001-1461 (1976 & Supp. V 1981) ("ERISA"). ERISA regulations also mandate that any "limitations, reductions, or restrictions of plan benefits shall be described or summarized in a manner not less prominent than the style, captions, printing type, and prominence used to describe or summarize plan benefits." 29 C.F.R. §2520.102-2(b) (1982). The disclaimer in the Bunker Hill summary plan description, although set off from the main body of text, is printed in substantially smaller type than the remainder of the text. The adequacy of such a disclaimer on a summary plan description is a factual dispute, suggesting that summary judgment was not properly granted in this case. Cf. Corley v. Hecht Co., 530 F.Supp. 1155, 1163-64 (D.D.C. 1982) (district court assessing adequacy of summary plan description).

2. *Management Representations*

Certain statements made by management may have led employees to believe that they had contracted for a lifelong medical insurance plan. One employee has stated under oath that he was told that insurance benefits would "continue for the rest of [his] life." The local union president was told that surviving spouses would receive insurance as long as they continued to pay their contributions to the plan.

Bunker Hill argues that these statements were never made and, if they were, they do not rise to the level of a material factual dispute. The first part of this argument does not help Bunker Hill's cause. The factual dispute over whether statements were actually made is precisely the sort of issue that is properly resolved by a jury. Thus, this dispute, if material, precludes summary judgment.

The second part of this argument, however, is more compelling. While representations to two of the 2400 workers employed by Bunker Hill may not constitute a material issue, when one of those two workers is the local union president, the representations become more troubling. An influential labor figure may bargain on behalf of others, or widely circulate misinformation. Under these circumstances, a more detailed inquiry into the effect of management representations is required. Although this issue may ultimately prove immaterial, the record is not yet sufficiently developed to make this determination. Thus, the district court must examine additional parol evidence to assess the materiality of management representations that insurance benefits were vested.

3. *Provision of Benefits During A Strike*

During a four-month strike in 1977, Bunker Hill provided insurance benefits to pensioners. Since labor-management agreements are not in effect during strikes, appellants cite this as evidence that retirement insurance benefits were not governed by the labor-management agreement.

The payment of benefits during a strike distinguishes this case from all of the cases relied upon by appellee. See Turner, 604 F.2d at 1222-23; International Union, United Automobile, Aerospace and Agriculatural Implement Workers of America v. Roblin Industries, Inc., 561 F.Supp. 288, 290-97, 114 LRRM 2418 (W.D. Mich. 1983); Metal Polishers, Local No. 11 v. Kurz-Kasch, Inc., 538 F.Supp. 368, 369, 110 LRRM 3315 (S.D. Ohio 1982) (strike immediately precedes plant closing; not mentioned in analysis of whether rights vested); United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO v. Lee National Corporation, 323 F.Supp. 1181, 1184, 1187-88, 76 LRRM 2861 (S.D.N.Y. 1971) (strike; company terminates welfare plan pursuant to its terms; no legal obligation to continue retirement insurance thereafter).

Conversely, the only case that analyzes in depth the effect of payment of insurance benefits during a strike concludes that payment suggests that the benefits are vested. United Auto Workers v. Cadillac Malleable Iron Co., — F.Supp. —, 113 LRRM 2525, 3 Empl. Ben. Cas. 1369 (W.D. Mich. 1982). The court discounted company testimony that payment was only an accommodation to workers because such testimony was "subjective and self-serving." Id. at 1375. It concluded that the "objective manifestation of a party's intent" should govern this contractual dispute. Thus when insurance benefits are provided during a strike, those benefits are probably not tied to the term of a labor-management agreement.

Although not bound by the precedent of the Cadillac court, we are convinced by its logic. If insurance benefits are provided while no labor-manage-

ment agreement is in effect, and no other agreement between the employer and employees has been reached, the contract must be deemed ambiguous. Here, we know that benefits were provided during a strike. There is no evidence on the record whether Bunker Hill and its employees had reached an agreement governing the provision of these benefits. It is improper to grant summary judgment before parol evidence on this issue has been heard.

CONCLUSION

If the labor-management agreement explicitly addressed the issue of whether retirement insurance benefits were vested, there might be no ambiguity in this contract. Absent express language, however, the combined effect of an arguably inadequate disclaimer in the Summary Plan Descriptions, misleading representations by management, and the provision of benefits during a strike is sufficient to preclude summary judgment. We therefore VACATE the order of summary judgment and REMAND for additional proceedings.

UAW v. CADILLAC MALLEABLE IRON CO.

U.S. Court of Appeals, Sixth Circuit (Cincinnati)

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, et al. v. CADILLAC MALLEABLE IRON COMPANY, INC., No. 83-1289, March 8, 1984

CONTRACTS

Insurance benefits for retirees — Expiration of contract — Effect ► 24.619 ► 116.404

Federal district court did not err in finding that benefits consisting of life insurance and hospital and health insurance of retired employees continue for lifetime of such employees and may not be terminated by employer at expiration of collective bargaining contract under which right to benefits was acquired. Although there is no legal presumption that retirement benefits are vested for life in absence of explicit showing of contrary intent, court reached its conclusion by relying, among other things, on bargaining history that included consideration of seven contracts and three strikes during which employer never indicated that retired employees were entitled to anything less than lifetime insurance benefits.

Appeal from the U.S. District Court for the Western District of Michigan (113 LRRM 2525). Affirmed.

Leonard R. Page, Detroit, Mich. (Michael L. Fayette and Kleiner, DeYoung and Fayette, Grand Rapids, Mich., and Judith A. Scott, Detroit, Mich., on brief), for appellees.

Richard A. Hooker (Schmidt, Howlett, Van't Hof, Snell and Vana, on brief), Grand Rapids, Mich., for appellant.

Before LIVELY, Chief Circuit Judge, EDWARDS, Circuit Judge, and TAYLOR, District Judge.*

Full Text of Opinion

LIVELY, Chief Judge. — This is a declaratory judgment action by the union and two retired employees of Cadillac Malleable Iron Company, Inc. (Malleable Iron). The plaintiffs sought a determination by the district court that Malleable Iron is contractually obligated to provide to retired employees for the duration of their lives, certain insurance benefits provided for in various collective bargaining agreements between the union and Malleable Iron. The complaint also sought injunctive relief and a judgment for expenditures made by the plaintiffs as a result of the employer's decision that such benefits had terminated. The question presented for decision is whether benefits consisting of life insurance and hospital and health insurance of retired employees continue during the lifetime of such employees or may be terminated by the employer at the expiration of the collective bargaining agreement under which the right to the benefits was acquired.

The district court conducted a trial after which it entered a comprehensive opinion containing findings of fact and conclusions of law. The district court canvassed the history of collective bargaining between the union and Malleable Iron. It gave detailed consideration to the actions of the employer with respect to the payment of premiums for life and health insurance of retired employees during periods when no collective bargaining agreement was in effect. The district court then concluded that it was the intention of the

* The Honorable Anna Diggs Taylor, Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

Appendix 3.

List Of Subjects' Occupations In Experiment One.

Office Clerk
Housewife (3)
Newspaper advertising manager
Secretary to chemical engineer
Bookkeeper
Salesperson
Chemist
Steelworker
Purchasing manager
Inventory control
Electronics servicing
Accountant (2)
Solicitor
Bakery manager
Clerical supervisor, university chemistry department
Math teacher
Chiropractic assistant
Fiscal accounts clerk
Credit collector
Secretary (4)
Student

Appendix 4.
Task Directions And List Of Questions Used In Experiment One

Directions. First read the brochure carefully. Then assume you are receiving a pension from the Bunker Hill Company, and read and answer the questions (printed on cards) out-loud. Say everything you are thinking as you answer, and I will tape-record your comments. Take as much time as you need. You may re-read or refer to the brochure as often as you like or feel necessary. Take your time and do not hurry.

1. According to the booklet, under what circumstances can the company cancel all of the medical benefits it describes? If you cannot find an answer to this question, or feel uncertain, explain what you would assume about cancellation of this plan if you were an employee of Bunker Hill.

2. What conditions must you meet in order to receive health benefits from Bunker Hill?

3. According to your understanding of information in the booklet, for how long do you belive the medical benefit plan covers you? Indicate the length of time below.

   - less than one year
   - more than one year
   - more than three years
   - lifetime (until I die)
   - other

4. According to the booklet, what happens to your medical plan benefits if you die?

5. From your understanding of the booklet, are there any conditions under which Bunker Hill may cancel or take away the entire medical insurance plan given to you here? If you believe there are such conditions, explain what they are. If you don't believe there are such conditions, or if you cannot find them stated, explain what you would assume about cancellation if you were an employee of Bunker Hill.

6. Do you believe that this booklet accurately describes the benefits you are entitled to receive, as a pensioner, from Bunker Hill?

7. According to your understanding of information in the booklet, if Bunker Hill Company decided to go out of business or was forced to close its operations, would you still receive the medical insurance benefits as part of your pension? If you cannot find the answer to this question, or feel uncertain, explain what you would assume would happen to this health benefit plan if the company went out of business or closed.

8. Do you believe that this booklet accurately describes conditions under which you, as a pensioner, are entitled to receive medical insurance from Bunker Hill?

9. Now that you have read the booklet, explain what you are eligible to receive?

Appendix 5.

List Of Subjects' Occupations In Experiment Two.

Photographer's assistant
Laundry worker
Teacher (retired) (2)
Cook
Receptionist (2)
Hospital workers (2)
Bank clerk
Maintenance worker
Security guard
Minister
Heating, physical plant workers (5)
Cab driver
Chemical engineer
Restaurant worker
Food service worker

Declined to specify occupation (6)

Appendix 6.

Sample Insurance Form With Disclaimer At The Beginning,
Enclosed In A Box

Continental Insurance

Commercial Insurance Company of Newark, New Jersey

180 Maiden Lane
New York, NY 10038

CERTIFICATE OF INSURANCE

Certificate Number is the same as the ACCOUNT NUMBER (Please refer to both Policy Number and Certificate Number in any communication concerning this insurance.)
MASTER POLICY NO. GTA 2800

This certificate is not a contract of insurance. It contains only the principal provisions relating to the coverage and payment of loss under the policy described herein. This certificate replaces any and all certificates previously issued to the Insured with respect to the policy described herein.

The Company Hereby Insures, subject to all the Exclusions, Provisions, and other terms of the Policy, the person named above whose completed enrollment form is on file with the Company (herein called the Insured) and, the spouse of the Insured (herein called Insured Spouse) qualifying as eligible under the classes described in the policy as Diners Club Cardholders and Spouses against loss resulting directly and independently of all other causes from accidental bodily injuries which arise out of hazards set forth below in the DESCRIPTION OF HAZARDS — A — Scheduled Airlines and B — Public Conveyance and are sustained by the Insured or Insured Spouse during the term of the policy herein called such injuries, provided the fare for such scheduled airline trip is charged to the Insured's Diners Club Card, to the extent herein provided.

In the event airline fares for such trip or trips are charged collectively, whether for the same flight or not (one charge form for all fares) then in such case the Insured and Insured spouse, if traveling on such trip or trips, are covered to the extent herein provided.

The Company also Insures, subject to all the Exclusions, Provisions, and other terms of the Policy, any person qualifying as eligible under the classes described in the policy as Supplemental Cardholders and Spouses against loss resulting directly and independently of all other causes from accidental bodily injuries which arise out of hazards set forth below in the DESCRIPTION OF HAZARDS — A —Scheduled Airlines and B — Public Conveyance and are sustained by the Supplemental Cardholder or Spouse during the term of the policy herein called such injuries, provided the fare for such scheduled airline trip is charged to the Insured's Diners Club Card, to the extent herein provided.

Persons covered under a supplemental card will be fully insured under the policy for a trip described only when the fare has been charged separately and individually (on a separate charge form) to a Diners Club Cardholder's enrolled account.

It is agreed that in the event airline fares for trips made by Supplemental Cardholders are charged collectively such collective charge must include fares only for Supplemental Cardholders. For persons insured under a supplemental card, whether for the same flight or not (one charge form for all fares) the Supplemental Cardholder and his or her spouse, if traveling on such trip or trips are covered to the extent herein provided.

SCHEDULE OF BENEFITS: If within one year from the date of accident such injuries shall result in death of an insured person, dismemberment or loss of sight, the Company will pay the sum set opposite such loss, provided further, that not more than one of these sums (the greater) shall be payable for injuries resulting from any one accident.

For Loss of Life	$500,000 The Principal Sum
For Loss of —	
Both Hands or Both Feet or Sight of Both Eyes	$500,000 The Principal Sum
One Hand and One Foot	$500,000 The Principal Sum
One Hand or Foot and Sight of One Eye	$500,000 The Principal Sum
One Leg or One Arm	$250,000 One-Half The Principal Sum
Either Hand or Foot	$250,000 One-Half The Principal Sum
Sight of One Eye	$250,000 One-Half The Principal Sum
Thumb and Index Finger of the Same Hand	$125,000 One-Quarter The Principal Sum